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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

JOHANNA F. FISKE et al.,
Petitioners,
v.
S. MAYNER WALLACE,
Respondent.

No. 1002

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners[1] respectfully show to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Ehrhardt D. Franz died testate in 1898, while a resident of the State of Missouri, leaving surviving him his widow, Sophie Franz, and ten children, viz.:

Ehrhardt W. Franz, Minna Kleinschmidt, Otto B. Franz, Johanna F. Fiske, Adelaide M. Zimmerman, Henrietta A. Holdoway, Amanda F. Wheeler, Gustav A. Franz, Walter G. Franz and Ernst H. Franz (State of Mo. v. Fiske et al., 290 U. S. 18, l. c. 21-22).

1. Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide M. Zimmermann and Otto B. Franz, and Arthur U. Simmons, Administrator c. t. a. of the Estate of Gustav A. Franz, deceased, and Sherman H. Kleinschmidt and Helen Kleinschmidt.

By the terms of his will his widow received a life estate, with remainder in equal parts to his ten children. Among the assets of his estate were 210 shares of American Arithmometer Company stock, which, by reorganization, became the Burroughs Adding Machine Company and which stock increased primarily through stock dividends until, at the time of the death of the life tenant, it reached 282,500 shares. The estate of E. D. Franz was duly administered in a proper court of probate and the possession of the properties comprising his estate were delivered to his life tenant, as provided by his will (State of Mo. v. Fiske et al., 290 U. S. 18, l. c. 22).

In January, 1909, the life tenant, Sophie Franz, created a living trust, whereunder she transferred the title to her life estate, along with other property held outright by her, to G. A. Buder and G. A. Franz, as trustees, directing the income and profits from the property comprising the trust to be paid in stipulated sums to her and to each of her children or their survivors (State of Mo. v. Fiske et al., 290 U. S. 18, l. c. 22).

On March 5, 1924, the present respondent, S. Mayner Wallace, brought suit in the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri on behalf of one of the remaindermen, Ehrhardt W. Franz, against one of the trustees, G. A. Buder, alleging in substance that his client was the owner of a one-tenth remainder interest in the properties of the E. D. Franz estate, and that the trustees of the life tenant were contending that such remainderman no longer had any remainder interest in the property involved, the prayer of the petition seeking an adjudication and quieting of title on behalf of his client, for an accounting and security from the trustees (State of Mo. v. Fiske et al., 290 U. S. 18, l. c. 22). Subsequently, the other trustee, the life tenant and the other remaindermen or their representatives, including

the petitioners herein, were made parties to the suit. The record discloses that the respondent designedly avoided bringing the suit as a class suit (R. 30). Two and one-third of the remainder estates, through their representative, Mississippi Valley Trust Company, and Earl Nelson, guardian ad litem, intervened on the side of respondent's client, while the petitioners, through their counsel, took the position that the action was prematurely brought, that stock dividends belonged to the life tenant and that the respondent's client, because of certain advancements made by the life tenant and by reason of the execution of certain instruments, was no longer the owner of any remainder interest in the estate of his father.

The trial court on May 5, 1927, entered a decree which found the issues in favor of the respondent's client and the intervenors, adjudged and quieted the title in the plaintiff and in the intervenors in their respective remainder estates, ordered an accounting, and required the trustees to give security in favor of such plaintiff and intervenors (Record No. 919, Sup. Ct. of the United States, Oct. Term, 1935, p. 148; State of Mo. v. Fiske et al., 290 U. S. 18, l. c. 22-23).

Petitioners' remainder estates were not expressly adjudged or quieted by such decree, nor was any security ordered to be given in favor of the petitioners. The respondent expressly objected to and opposed the inclusion of the petitioners' remainder estates in such decree (R. 172-3). The decree of the trial court was affirmed by the Circuit Court of Appeals for the Eighth Circuit on May 16, 1928 (Buder et al. v. Franz et al., 27 F. [2d] 101).

For his services in the representation of his client the respondent was allowed the sum of $26,000.00 (Wallace v. Franz, 66 F. [2d] 457).

Shortly after the death of the life tenant, in 1930, the

petitioners applied to the trial court for a distribution to them of their remainder estates. While this application was pending the State of Missouri, with the active co-operation of the respondent (R. 295-299), in the Probate Court of the City of St. Louis in the estate of the life tenant, Sophie Franz, endeavored to require her executor to inventory the petitioners' remainder estates as part of the assets of her estate, so as to subject such assets to the state inheritance tax, and at the same time intervened in the proceedings pending in the federal court, setting up the fact of the pendency of the proceedings in the Probate Court and asked the federal court to require the trustees to deliver the assets comprising the petitioners' remainder estates to the executor of the estate of Sophie Franz (R. 291) (R. 293) (State of Mo. v. Fiske et al., 290 U. S. 18, l. c. 23-24).

Upon such intervention, the petitioners, through their counsel, sought to enjoin the State of Missouri from proceeding in the Probate Court, on the ground that the State had submitted to the jurisdiction of the federal court and that the proceedings in the Probate Court were in derogation of and prejudicial to the proceedings then pending in the federal court. The application for injunction was ultimately denied by this Court (see Mo. v. Fiske, 290 U. S. 18, 54 Sup. Ct. 18, 78 L. Ed. 145) as being in violation of the eleventh amendment to the Constitution, the Court ruling that the State of Missouri had the right to proceed in the courts of the State of Missouri to determine the ownership of the assets comprising petitioners' remainder estates. Thereupon the Eighth Circuit Court of Appeals affirmed the order of the trial court in requiring delivery of the assets comprising the petitioners' remainder estates to the executor of the Sophie Franz estate (Fiske et al. v. State of Mo., 69 F. [2d] 683) observing that the ownership of such assets were under the holding of this Court in

Missouri v. Fiske et al., supra, to be determined by the state court.

In May, 1934, while the State of Missouri proceedings aforementioned, were still pending in the state courts, the respondent filed in the original proceedings and as ancillary thereto, his petition for assessment of fees against the petitioners on account of benefits alleged to have accrued to petitioners by reason of his services in the procurement of the decree of May 5, 1927, aforementioned (R. 260-3). This petition for assessment of counsel fees, on motion of some of the respondents, was denied and dismissed by the trial court (R. 270). On appeal the United States Circuit Court of Appeals for the Eighth Circuit first affirmed the action of the District Court (Wallace v. Fiske et al., 80 Fed. [2d] 897), but on rehearing reversed the order and decree of the District Court, and remanded the cause for trial on the merits (Wallace v. Fiske et al., 80 F. [2d] 905), holding that further proceedings should be stayed until the state proceedings had been determined in the state courts, observing that **the primary question involved was whether respondent was entitled to an assessment of counsel fees against each of the petitioners' estates "upon a final determination" by the state courts that the petitioners' "estates are protected by the decree of May 5, 1927"** (Wallace v. Fiske et al., 80 F. [2d], l. c. 905).

On March 15, 1939, the Supreme Court of Missouri, in In re Franz's Estate, 344 Mo. 510, 127 S. W. (2d) 401, l. c. 406 and 407, held as an original question that petitioners had never parted with the title to their respective remainder estates, observing in its opinion that it was unnecessary for it to decide the effect of the decree of May 5, 1927, upon the title to petitioners' remainder estates.

After this decision by the Supreme Court of Missouri the application of respondent for assessment of counsel

fees from petitioners was heard and resulted in the trial court assessing a total of $66,666.66 against petitioners, basing the right to such compensation on the ground that the professional services of the respondent, commencing in 1923, had resulted in preventing the surrender of and preserving to the petitioners their respective remainder estates and in a saving of inheritance taxes and administration costs of approximately $293,000.00 to each full remainder estate of petitioners (R. 408-9). The trial court permitted the respondent to amend his application for assessment of counsel fees so as to assert his right to such compensation as of the time when the tax litigation in the state courts was finally terminated in favor of the petitioners (R. 409).

On appeal it was contended by your petitioners that in view of the holding of this Court in State of Missouri v. Fiske et al., 290 U. S. 18, and the opinion of the Eighth Circuit Court of Appeals in Fiske v. State of Missouri, 69 F. (2d) 683, and Wallace v. Fiske et al., 80 Fed. (2d) 905, the right of the respondent to an assessment of counsel fees against the petitioners was predicated upon a final determination by the state courts that the decree of May 5, 1927, procured by respondent, embraced and protected the remainder estates of the petitioners. These petitioners further contended that since the Supreme Court of Missouri did not so hold, but decided as an original question, that the title of petitioners' remainder estates was vested and continued in the petitioners at all times since the death of the father in 1898, the respondent's application for assessment of counsel fees necessarily failed.

It was further contended by the petitioners that in view of the respondent's objection to the inclusion of the petitioners' remainder estates in the decree of May 5, 1927 (R. 172-3), and his subsequent militant efforts in the State

of Missouri proceedings, both in the federal and the Probate courts, to have petitioners' remainder estates declared a part of the estate of the life tenant (R. 293-299), such acts and conduct on the part of the respondent did not bring his application for allowance within the purview of the law as enunciated by the Court.

The Eighth Circuit Court of Appeals, in an opinion rendered on the 31st day of January, 1941 (R. 451-456), affirmed the judgment of the trial court holding that since the Supreme Court of Missouri in In re Franz's Estate, supra, held exactly as to the petitioners' interests as had been determined by the federal court regarding the other three and one-third interests, though it reached its result on independent reasoning, the effect was exactly as if the Supreme Court of Missouri had adopted the federal court decree of May 5, 1927, as its opinion.

The petition for rehearing was filed by petitioners and overruled by the last mentioned court on the 5th day of March, 1941 (R. 465).

B.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Your petitioners submit that a writ of certiorari should be issued, and that the decision of the Circuit Court of Appeals should be reversed, for the following reasons:

I.

The Circuit Court of Appeals has rendered a decision which is in conflict with the decision of this Court on the same matter, i. e., State of Missouri et al. v. Fiske et al., 290 U. S. 18, in that this Court there held (290 U. S., l. c. 29) that the question of the ownership of the remainder interests of the present petitioners in the estate of Ehrhardt

D. Franz was a matter to be litigated and decided in the state courts of Missouri, whereas the Circuit Court of Appeals has awarded respondent counsel fees against petitioners, with whom he had no contract of employment, on the ground that said question was decided and determined in a proceeding in the federal court wherein respondent represented a remainderman other than the present petitioners.

II.

The Circuit Court of Appeals has rendered a decision in conflict with a decision of another Circuit Court of Appeals on the same matter, namely, that of the Circuit Court of Appeals for the Second Circuit, in the case of Nolte v. Hudson Navigation Company, 47 Fed. (2d) 166, and also in conflict with the decision of this Court in the case of Hobbs v. McLean, 117 U. S. 567. The Circuit Court of Appeals below held that the adverse conduct of the respondent in opposing the inclusion of these petitioners in the decree rendered in the federal court did not bar his claim for compensation against these petitioners, whereas this Court and the Circuit Court of Appeals for the Second Circuit in the respective cases above mentioned have held that where one maintains adverse proceedings to take trust property from those rightfully entitled to it, and to distribute it to those who claim adversely, he is not entitled to an allowance under the equitable doctrine that he who brings a suit for the preservation or administration of a trust fund will be entitled to compensation from the fund.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court, and the Judges thereof, to certify and send to this Court for its review and determination a full and complete transcript

of the record and of proceedings in the cause numbered and entitled on its docket "No. 11,775, Johanna F. Fiske et al., Appellants, v. S. Mayner Wallace, Appellee," to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Eighth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

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